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Supreme Court, U.S.
FILED
JUN 13 2003
OFFICE OF THE CLERK

No. 02-367

IN THE

Supreme Court of the United States

AMERICAN CYANAMID COMPANY,
Petitioner,

v.

TERRY GEYE *and* BRANDON GEYE,
Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of Texas

PETITIONER'S FOURTH SUPPLEMENTAL BRIEF

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PETITIONER'S FOURTH SUPPLEMENTAL BRIEF[1]

Pursuant to Sup. Ct. R. 15.8, Petitioner American Cyanamid Company wishes to alert the Court to a just-issued Fifth Circuit opinion which *directly conflicts* with the Texas Supreme Court's *Geye* opinion below.

The farmers in *Dow AgroSciences LLC v. Bates*, No. 02-10908, 2003 WL 21221722 (5th Cir. June 11, 2003) – like the Respondent farmers here – claimed that their Texas peanut crops suffered herbicide-related injuries such as stunted growth and inhibited foliage development. Further, as is the case here, the farmers in *Dow AgroSciences* alleged that they had been misled by "off-label" promotional statements and sought damages based on various Texas state law causes of action, including breach of implied and express warranties, strict liability, and violation of the Texas Deceptive Trade Practices Act. *See id.*, at *1; *compare* Pet., App. at 2a.

Unlike the Texas Supreme Court's opinion in *Geye*, however, the federal court of appeals held that "state labeling requirements related to product effectiveness are . . . within the scope of FIFRA's express preemption clause," 7 U.S.C. § 136v(b). *Dow AgroSciences,* 2003 WL 21221722, at *4. *Unlike* the state supreme court's opinion below, the court of appeals held that "because FIFRA's express preemption clause is self-executing, FIFRA preemption of performance-related state law claims is *not dependent* upon the existence of conflicting EPA regulations." *Id.* at *8 (emphasis added). And *unlike* the opinion below, the court of appeals held that

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[1] The amended Rule 29.6 corporate disclosure statement filed with Petitioner's Supplemental Brief remains accurate.

§ 136v(b) "expressly preempted the farmers' state law claims." *Id.* at *4.

In *Dow AgroSciences* the herbicide manufacturer "filed for declaratory relief in anticipation of being sued in state court" by "29 Texas peanut farmers." *Id.*, at *1, *3. The manufacturer "sought, among other things, a judicial declaration that [§ 136v(b) of FIFRA] preempts the farmers' state law claims." *Id.*, at *1. The farmers counterclaimed with their state law damages claims. *Id.*

Citing the Texas Supreme Court's adverse pre-emption opinion in *Geye*, the Fifth Circuit court of appeals noted that the manufacturer's "choice of a federal court was *no doubt a strategic one*." *Id.*, at *3 n.4 (emphasis added). In other words, the court of appeals confirmed that because of *Geye*, the question of whether Texas farmers' crop injury claims are subject to FIFRA pre-emption currently depends upon whether those claims are brought in a Texas federal district court or a Texas state court.

The court of appeals opinion discusses in detail why it rejects the farmers' argument, virtually identical to the Texas Supreme Court's conclusion in *Geye*, "that FIFRA preemption of [product] performance-related claims requires the existence of conflicting EPA enactments." *Id.*, at *5. In particular, the court of appeals opinion explains as follows:

> . . . FIFRA's text does *not* define the scope of FIFRA's preemption clause to be a function of existing EPA regulations . . . .
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> * * *
>
> The scope of FIFRA's express preemption clause is defined by the simple text of § 136v. *That the EPA has not elected to impose labeling regulations concerning product effectiveness does not alter the plain meaning of § 136v(b) nor avoid preemption of a claim that has the effect of imposing labeling*

> *requirements*. For a state to create a labeling requirement by authorizing a claim linked to the specifications of a label, even where the EPA has elected not to impose such labeling requirements, *would clearly be to impose a requirement "in addition to or different from those" required under FIFRA. See* 7 U.S.C. § 136v(b). Thus, the farmers' claims, including those which challenge [the herbicide's] effectiveness, *are within the scope of FIFRA's express preemption clause* if they are related to the content of the [herbicide] label.

Id., at *5 (emphasis added).

The court then indicated that a "claim's relatedness to a product label may be determined *simply by reference to the party's pleadings*." *Id.*, at *6 (citing *Andrus v. AgrEvo USA Co.*, 178 F.3d 395, 399 (5th Cir. 1999) (emphasis added).[2] On that basis, the court found that the farmers' strict liability and negligence claims were "a disguised claim for failure to warn," and therefore pre-empted by § 136v(b). *Id.*, at *7, *8. As to the farmers' breach of warranty, fraud, and Texas Deceptive Trade Practices Act claims, the court held that they were pre-empted because there was no evidence demonstrating that the alleged "off-label" representations upon which they were based "differed or strayed" or "deviated from the contents of the [herbicide] label." *Id.*, at *6, *7. Similarly, as Petitioner American Cyanamid has emphasized, the lower Texas state courts determined here that "[t]he off-label statements merely repeated information

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[2] This is in stark contrast to the Solicitor General's assertion in his *amicus* brief here that determining whether a claim is labeling-related "present[s] questions of federal law." U.S. Amicus Br. at 15.

on the labels," and therefore, that "[a]ll of [Respondents'] claims relate directly or indirectly to the product label." Pet., App. at 16a & n.2.

The Fifth Circuit's opinion criticizes as "wholly unnecessary and inappropriate" what it refers to as the Texas Supreme Court's attempt in its opinion below to "import notions of implied preemption" into what should have been an express pre-emption analysis based solely on the plain language of § 136v(b). *Dow AgroSciences*, 2003 WL 21221722, at *5. The court of appeals notes in this regard that instead of focusing on "the scope of FIFRA's express preemption clause," the state supreme court discusses only a supposed "exception to preemption" for efficacy-related claims. *Id.* at *5 & n.13; *see also Anderson v. Dow AgroSciences LLC*, No. CIV-01-1939-HE, 2003 WL 21182933, at *3 n.12 (W.D. Okla. May 14, 2003) (indicating that "*given the scope of the FIFRA preemption* as interpreted by the Tenth Circuit . . . and most other courts, the distinction [drawn in *Geye* for efficacy-related claims] is not dispositive here") (emphasis added).[3]

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[3] Although it justifiably took issue with the Texas Supreme Court's analysis, the federal court of appeals incorrectly asserted that "*Geye* proceeds from the assumption that the claims at issue did not relate to product labeling." *Dow AgroSciences*, 2003 WL 21221722, at *5. As Petitioner has previously discussed, exactly the opposite is true. *See* Petitioner's Third Supplemental Br. at 4-7. Indeed, if the state supreme court had concluded, or even assumed, that none of Respondents' claims are labeling-related (despite the lower Texas courts' explicit determination that *all* of Respondents' claims are labeling-related and Respondents' concession that at least some of their claims are labeling-related), the court would have been rendering an advisory opinion. *See id.* at 5.

The *Dow AgroSciences* opinion demonstrates that there is a deep, well defined, irreconcilable split of authority between the Texas Supreme Court and the Fifth Circuit (as well as between the Texas Supreme Court and the California Supreme Court) on the important, recurring question of whether agricultural crop injury claims are encompassed by FIFRA pre-emption. Only this Court can resolve the conflict by granting review in *American Cyanamid v. Geye*.

CONCLUSION

For the foregoing reasons, and those presented in the petition, reply brief, three previous supplemental briefs, and CropLife America *amicus* brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 2003